IT IS ORDERED as set forth below:

Date: September 04, 2008

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
LINDA HOLBROOKS SHOLAR,	:	BANKRUPTCY CASE NO. 07-12927-WHD
Debtor.	:	
WILLIAM W. REDWINE,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO. 08-1013
v.	:	
LINDA HOLBROOKS SHOLAR,	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendant.	:	

ORDER

Before the Court is the Motion to Dismiss and a Motion for Protective Order

filed by Linda Holbrooks Sholar (hereinafter the "Defendant"), in the above-referenced adversary proceeding. The motions arise in connection with a complaint objecting to discharge and to determine the dischargeability of a particular debt allegedly owed by the Defendant to William Redwine (hereinafter the "Plaintiff'). Consequently, these issues constitute a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I) & (J); § 1334.

PROCEDURAL HISTORY

On December 1, 2007, the Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On March 5, 2008, the Plaintiff filed an adversary complaint objecting to the Defendant's discharge and seeking a determination of the dischargeability of a particular debt. In the Complaint, the Plaintiff contends that the Defendant's debts are nondischargeable because of, among other things, certain acts of fraud, false representation, and conversion committed by the Defendant. Specifically, the Plaintiff avers that the Defendant owes the Plaintiff approximately a debt of one hundred and fifty thousand dollars that is not subject to discharge pursuant to sections 523(a)(2)(A), (a)(4), and (a)(6). The Plaintiff also objects to the Defendant's discharge pursuant to sections 727(a)(2)-(5) on the basis that the Defendant committed certain acts intended to defraud the Plaintiff as a

creditor, concealed financial information from the Plaintiff and the Court, and concealed assets. On April 2, 2007, the Defendant filed an answer to the Complaint. In her answer, the Defendant asserts that the Plaintiff is judicially estopped from prosecuting an adversary proceeding against the Defendant because the Plaintiff previously failed to list his claim against the Defendant as an asset in his own Chapter 7 bankruptcy case, which he filed in August 2007. The Defendant also disputes the Plaintiff's allegations that she committed fraud, false representation, and conversion.

On April 15, 2007, the Defendant filed a Motion to Dismiss the Complaint on the basis that the Plaintiff's failure to disclose the claim in his own bankruptcy case judicially estops him from proceeding on the claim. Furthermore, the Defendant argues that the same principles of judicial estoppel require a finding that the Plaintiff is not a creditor in the Defendant's bankruptcy case, and therefore, lacks standing to challenge the dischargeability of debts or the entry of the Defendant's discharge.

On May 22, 2008, the Defendant filed the instant motion for a protective order. In that motion, the Defendant seeks an order staying further discovery in this case until the Court has resolved the pending motion to dismiss the complaint. In support of her motion, the Defendant contends that the motion to dismiss will dispose

completely of the Plaintiff's complaint and, accordingly, any further discovery would be unnecessary and would impose upon her undue burden and expense.

FACTUAL BACKGROUND

According to the Plaintiff's complaint, the Defendant worked as a real estate agent for the Plaintiff for several years and completed two trouble-free real estate transactions for the Plaintiff. The Plaintiff then approached the Defendant in 2004 for assistance in securing a loan on a Lake Jackson property. Though the Plaintiff did not own the property, the Plaintiff was then holding title to the property in trust for William Howard, Jr. as security for a personal loan. The Defendant persuaded the Plaintiff to agree to a plan whereby the Plaintiff would and did convey title to the Lake Jackson property to the Defendant. The Defendant then procured a loan using the Defendant's good credit. The proceeds of the loan were then made available to the Plaintiff, excepting a small fee to be paid for the Defendant's services.

Shortly after the Lake Jackson loan was made, the Defendant agreed to help the Plaintiff obtain another loan. In this instance, the Defendant purchased a Florida apartment building owned by the Plaintiff. Though the Defendant did not pay the Plaintiff for title to the property, the Defendant took out a loan for $423,000 on the property. The loan proceeds were then held by the Defendant in an escrow account

for the Plaintiff's use. Next, the Defendant issued the Plaintiff money from the loan proceeds that the Plaintiff used to pay off existing debts. The plan agreed to between the Plaintiff and Defendant stipulated that the Defendant would sell the apartment building one year later to pay off the loan. Meanwhile, the Plaintiff would use the loan proceeds to assist the Defendant in making loan payments.

When the Plaintiff later asked for an accounting of the loans and the money being held in trust for the Plaintiff, the Defendant refused to make such an accounting. The Defendant also refused to convey the Lake Jackson property back to the Plaintiff, as had been agreed to between the parties. The Plaintiff avers that the Defendant owes the Plaintiff approximately one hundred and fifty thousand dollars ($150,000).

The Defendant contends that, on August 7, 2007, the Plaintiff filed for bankruptcy relief under Chapter 7 of the Bankruptcy Code and that, although he was required, under penalty of perjury, to list all property, assets, and claims in his schedules, the Plaintiff did not list any claim against the Defendant for the unpaid debt of $150,000 or any property being held in trust by the Defendant. According to the Defendant, the bankruptcy case was later dismissed after the trustee filed a report with the Court that the Plaintiff had failed to attend both the first and rescheduled meeting of creditors. The Defendant also alleges in her motion to

dismiss that, on the same date that the Plaintiff filed his bankruptcy petition, he filed a civil suit against the Defendant in the Superior Court of Coweta County for breach of contract and breach of fiduciary duty.

CONCLUSIONS OF LAW

A. *Motion to Dismiss*

The Defendant contends that the Plaintiff's complaint must be dismissed for failure to state a claim upon which relief may be granted. Pursuant to Federal Rule of Bankruptcy Procedure 7012(b), which makes Federal Rule of Civil Procedure 12(b) applicable to this proceeding, dismissal is proper when the plaintiff's complaint fails to state a claim upon which relief can be granted. FED. R. BANKR. P. 7012(b); FED. R. CIV. P. 12(b)(6). When reviewing a complaint for purposes of adjudicating a motion to dismiss under Rule 12(b)(6), the Court must accept as true all of the factual allegations contained in the complaint and, on the basis of those facts, determine whether the plaintiff is entitled to relief. *See Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp*., 459 F.3d 1249 (11th Cir. 2006) (court must "view the complaint in the light most favorable to the plaintiff and accept the well-pleaded facts as true"). The facts asserted in the complaint need only comprise a "short and

plain statement" that shows that the plaintiff has a claim to relief that is "plausible on its face." *See* FED. R. BANKR. P. 7008; Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S. Ct. 1955 (2007); *see also Schaaf v. Residential Funding Corp*., 517 F.3d 544 (8th Cir. 2008).

"The relevant record under consideration consists of the complaint and any 'document integral or explicitly relied on in the complaint.'" *In re New Century Holdings, Inc.*, 387 B.R. 95 (Bankr. D. Del. 2008) (quoting *U.S. Express Lines, Ltd. v. Higgins,* 281 F.3d 383, 388 (3d Cir.2002); *see also In re Raymond Professional Group, Inc.,* 386 B.R.678 (Bankr. N.D. Ill. 2008) ("A court may consider only the contents of the pleadings," which include "'the complaint, the answer, and any written instruments attached as exhibits,' . . ., including documents incorporated by reference in the pleadings.").

Here, the Defendant contends that, under any set of facts that the Plaintiff may be able to prove with regard to her conduct, the Plaintiff's complaint will necessarily fail because the Plaintiff is judicially estopped from pursuing the collection of any debt against her. Judicial estoppel is an equitable doctrine intended to guard against the unfair assertion of inconsistent claims. *Burnes v. Pemco Aeroplex, Inc.* 291 F.3d 1282 (11th Cir. 2002); *see also New Hampshire v. Maine*, 532 U.S. 742, 750. Under this doctrine, a party is barred from asserting a claim that is inconsistent with another

claim that the same party asserted in a previous legal proceeding simply because it would be in the party's best interests to change her legal position. *New Hampshire v. Maine*, 532 U.S. at 742-43; *see also* 18 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 134.30, p. 134-62 (3d ed. 2000). If a party could acquire a legal advantage by asserting a claim that is inconsistent with one asserted in an earlier legal proceeding, "the integrity of the judicial system" would be compromised. *New Hampshire v. Maine*, 532 U.S. at 743. That is to say, the pursuit of a just result between adversarial parties would be patently abandoned for an underhanded pursuit of advantageous legal positions, however inconsistent such positions might be with one's earlier legal position.

According to the Supreme Court, judicial estoppel should be applied when the following factors are present, though the factors are not to be taken as "inflexible prerequisites." *Id.* First, there must be a clear inconsistency between the present claim the party wishes to assert and the party's previously asserted claim. *Id.* Second, the previously asserted claim or legal position must have been accepted by the earlier court, with the result that "judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* Finally, an unfair advantage must obtain as a result of the assertion of inconsistent claims. *Id.*

The Eleventh Circuit Court of Appeals' interpretation of the *New Hampshire v. Maine* opinion has reduced these three factors to a two-prong test: one, was the prior claim made under oath; and two, were the inconsistent assertions "calculated to make a mockery of the judicial system"? *Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001); *see also Burnes*, 291 F.3d at 1285. The first prong is satisfied when a debtor fails to list a pending or current cause of action as an asset on the bankruptcy schedules. *Burnes*, 291 F.3d at 1286. The schedules must be signed under penalty of perjury, which in effect is equivalent to the debtor stating under oath that she does or does not have pending or current causes of action. *Id.* The second prong of the test is satisfied when "deliberate or intentional manipulation" can be "inferred from the record," which occurs when the debtor has both knowledge of the undisclosed claims and a motive for nondisclosure. *Id.* at 287; *Barger v. City of Cartersville*, 348 F.3d 1289, 1293-94 (11th Cir. 2003). The debtor's failure to list the claim is only considered inadvertent when, "in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Burnes*, 291 F.3d at 1287.

In the case at hand, the Defendant urges the Court to dismiss the Plaintiff's Complaint under the doctrine of judicial estoppel, arguing that the Plaintiff failed to disclose the relevant claim in the schedules filed in the bankruptcy case that he filed

on August 7, 2007. As noted above, at the motion to dismiss stage, the "bankruptcy court tests sufficiency of complaint, not merits of suit." *Schwinnn Cycling and Fitness, Inc. v. Benonis*, 217 B.R. 790, 795 (N.D. Ill. 1997). Moreover, a "bankruptcy court must accept all pleaded facts as true and draw all reasonable inferences in light most favorable to non-moving party. Nonetheless, in order to withstand motion to dismiss, complaint must allege facts sufficiently setting forth essential elements of a cause of action." *Id.*

The Court cannot dismiss the Plaintiff's complaint at this point. First, the Plaintiff may have evidence to rebut the presumption that his failure to list the claim against the Defendant was intended to manipulate the courts. If so, the Plaintiff may be able to prove a set of facts that would undercut the Defendant's judicial estoppel defense. It would not be appropriate to deprive the Plaintiff of the ability to present this evidence to the Court at a later stage of this litigation.

Second, the Court has no proper evidence before it with regard to the Plaintiff's previous bankruptcy filing. When a motion to dismiss is pending, the Court must consider only the pleadings. *See In re Raymond Professional Group, Inc.,* 386 B.R.678 (Bankr. N.D. Ill. 2008) ("A court may consider only the contents of the pleadings," which include "'the complaint, the answer, and any written instruments attached as exhibits,' . . ., including documents incorporated by reference

in the pleadings."). If the Court considers matters outside of the pleadings, the Court must treat the motion as one for summary judgment and must give all parties a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. FED.R.CIV.P. 12(d). An exception to this rule exists when the facts to be considered can be judicially noticed by the Court, or the fact is crucial to the plaintiff's claim and is not in dispute. *See Brown v. Brock*, 169 Fed. Appx. 579 (11th Cir. 2006).

The Court cannot take judicial notice of the fact that the Plaintiff previously filed a bankruptcy petition or of the fact that he failed to disclose a claim against the Plaintiff. *See id*. ("The district court in this case granted [defendant's] motion for judgment on the pleadings, but it considered [plaintiff's] bankruptcy petition, which we have concluded may not be judicially noticed. Because the court did not provide notice to [plaintiff] that [defendant's] motion was converted to a motion for summary judgment and because the court did not provide [plaintiff] with ten days in which to supplement the record, the district court's decision to dismiss [plaintiff's] suit must be vacated."); *see also Concordia v. Bendekovic*, 693 F.2d 1073, 1076 (11th Cir.1982) ("As a general rule, a court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, unless the prior proceedings are introduced into evidence."). Because the Court cannot take

judicial notice of the Plaintiff's bankruptcy case, and the documents have not been properly admitted into evidence,[1] the Court cannot consider or draw any inference from the Plaintiff's bankruptcy schedules.

Finally, the Court questions whether, as a matter of law, judicial estoppel would apply under the circumstances of this case. Specifically, in most cases in which judicial estoppel has been applied, the plaintiff-debtor received a discharge. *See Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003) (plaintiff received a complete discharge after falsely stating on his bankruptcy schedules that he had no pending or unliquidated claims, when in fact he had filed an employment discrimination suit shortly before filing bankruptcy); *see also Burnes*, 291 F.3d at 1284 (plaintiff received a discharge four months after falsely stating under oath in his Chapter 7 bankruptcy schedules that he had no pending or unliquidated claims). Here, according to the documents relied upon by the Defendant in her motion to dismiss, the Plaintiff never received a discharge and his case was dismissed shortly

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[1] The Defendant did attach to her motion to dismiss copies of documents signed and filed by the Plaintiff in his bankruptcy case. The Court cannot consider these documents, however, because they are not accompanied by an affidavit and, accordingly have not properly entered the record. *See* FED. R. CIV. P. 56(e); *see also In re Walton*, 158 B.R. 948, 951 (Bankr. N.D. Ohio 1993) ("'[D]ocuments . . . [that] are not part of the pleadings, depositions, answers to interrogatories, and admissions on file, can only enter the record as attachments to an appropriate affidavit to constitute a basis for summary judgment.'"). Exhibits attached to pleadings may be considered in such a manner, but a motion to dismiss is not a "pleading" for this purpose. *See* FED. R. CIV. P. 7.

after filing for failure to attend the meeting of creditors.

Consequently, one could argue that this Court never relied on the Plaintiff's schedules in the usual sense of granting the Plaintiff a discharge based on the information disclosed in the schedules. Applying judicial estoppel based on the presence of only two of the three factors outlined by the United States Supreme Court might violate the Supreme Court's directive not to apply "inflexible prerequisites or an exhaustive formula" that ignore the "specific factual contexts" of the cases. *New Hampshire*, 532 U.S. at 751. *See also Burnes*, 291 F.3d at 1286 (holding that "these two enumerated factors [knowledge and a motive to conceal] are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case").

On the other hand, however, the Eleventh Circuit Court of Appeals has applied the doctrine of judicial estoppel in a rather strict manner that "protects the integrity of the judicial system, not the litigants" and emphasizes the importance of the duty of "full and honest disclosure" in a bankruptcy proceeding. *Burnes*, 291 F.3d at 1286; *see also Pavlov v. Ingles Markets, Inc.*, 236 Fed. Appx. 549 (11th Cir. 2007); *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999). Additionally, persuasive authority exists for the proposition that a bankruptcy court relies on the fact that no assets are available for creditors when allowing a case to be dismissed

without a discharge and that a debtor who fails to disclose an asset obtains the advantage of the automatic stay while the case is pending. *See Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 59 (S.D.N.Y. 1999) (finding that a debtor was judicially estopped from pursuing a claim not properly disclosed in disclosure statements, even though the case was dismissed without discharge). In any event, the Court cannot dismiss the complaint at this stage. The parties will, therefore, have a further opportunity to brief this legal question.

B. *Motion for Protective Order*

Discovery in this adversary proceeding is controlled by Rule 7026 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 26 of the Federal Rules of Civil Procedure. Rule 26(b)(1) provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1). A party may move for a protective order pursuant to

Rule 26(c). Upon a finding of good cause, the Court may protect the party from "annoyance, embarrassment, oppression, or undue burden" by forbidding disclosure or discovery. FED. R. CIV. P. 26(c)(1). Such a motion "must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." *Id*.

First, the Defendant's motion is procedurally defective because the Defendant has not attached a separate certification as required by Rule 26(c)(1). *See In re Spears*, 265 B.R. 219 (Bankr. W.D. Mo. 2001). Second, even if the motion were not defective, the basis argued in favor of entering a protective order is no longer extant, as the Court has denied the Defendant's motion to dismiss.

CONCLUSION

For the reasons stated above, the Defendant's Motion to Dismiss and Motion for Protective Order are hereby **DENIED**.

END OF DOCUMENT